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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 27 2009

SRC 08 077 53227

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner provides development and consulting services. It seeks to employ the beneficiary permanently in the United States as a project manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a foreign equivalent degree to a U.S. baccalaureate.

On appeal, counsel submits a brief and resubmits previously submitted evidence. On January 12, 2009, this office advised the petitioner of derogatory evidence. In response, counsel submits a brief and new evidence. For the reasons discussed below, counsel's assertions are insufficient to overcome all of the concerns raised in our notice.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The petitioner submitted the beneficiary's three-year Bachelor of Science in Chemistry from the University of Mumbai and his three-semester Advanced Diploma in Network Centered Computing from the National Institute of Information Technology (NIIT) at the Fountain Center in Mumbai. Thus, the issues are whether either degree is a foreign degree equivalent to a U.S. baccalaureate degree. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

Eligibility for the Classification Sought

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone

unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

On appeal, counsel relies on a letter from [redacted] Director of the Business and Trade Services Branch of U.S. Citizenship and Immigration Services (USCIS) Office of Adjudications. In response to our January 12, 2009 notice, counsel asserts "your office seems to have accepted [redacted] recommendation." In our notice, we advised that the purpose of the notice was to provide notice of derogatory evidence and that the assertions on appeal would be discussed in our final decision. Thus, by failing to discuss this letter the AAO was in no way accepting [redacted]s conclusions.

[redacted] discusses whether a "foreign equivalent degree" must be in the form of a single degree or whether the beneficiary may satisfy the requirement with multiple degrees. The Office of Adjudications letter is not binding on the AAO. Letters written by the Office of Adjudications do not constitute official USCIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any USCIS officer as they merely indicate the writer's analysis of an issue. *See* Memorandum from [redacted] Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000)(copy incorporated into the record of proceeding).

Rather, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.,* 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of

Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a

bachelor's degree rather than a "foreign equivalent degree."[1] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2).[2] As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification.

In our January 12, 2009, notice, we also advised that the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Compare* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability allowing the submission of a broader category of evidence characterized as "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability"). The broader language at 8 C.F.R. § 204.5(k)(3)(ii)(A) does not cover professionals. We noted that NIIT is not itself a college or university, which is not contested.

In response to our notice, counsel notes that the commentary includes the phrase "or an equivalent degree" which, according to counsel, allows for an equivalent degree that was not obtained from a college or university. We interpret the language in the commentary as permitting an equivalent degree that may have a name other than "bachelor's degree" but is still awarded by a college or university. Regardless, counsel's interpretation of the commentary does not overcome the regulatory language at 8 C.F.R. § 204.5(l)(3)(ii)(C). That language requires a professional to provide a college or university record showing the date the baccalaureate degree was awarded. While the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) relates to a lesser classification, professionals under section 203(b)(2) of

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[1] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

[2] The education need not all derive from the same institution, such as when an individual obtains an associate's degree followed by a bachelor's degree, but the ultimate degree must be, in and of itself, a baccalaureate or foreign equivalent degree.

the Act, it cannot be concluded that the beneficiary is a member of the professions holding an advanced degree if he cannot be considered a member of the professions in the first place.

In light of the above, we continue to hold that the beneficiary must have a baccalaureate or foreign equivalent degree from a college or university. Regardless, even if we accepted this rebuttal, the petitioner would still have to demonstrate that an advanced diploma from NIIT is truly an equivalent degree to a college or university baccalaureate degree.

Initially, the petitioner submitted an evaluation from [redacted] asserting that the beneficiary's three-year baccalaureate satisfied "substantially similar requirements to the completion of three years of academic studies leading to a Bachelor of Science Degree from an accredited institution of higher education in the United States." Mr. [redacted] then concluded that the beneficiary's diploma from NIIT was equivalent to one and a half years of baccalaureate study in the United States. Mr. [redacted] finally concluded that the beneficiary's education in the aggregate is equivalent to a U.S. Bachelor of Science in Computer Science. Mr. [redacted] indicates that he is a member of the American Association of Collegiate Registrars and Admissions Officer (AACRAO) and lists an AACRAO publication as one of his references. Mr. [redacted] does not attach any pages from his references supporting his conclusions. In response to our January 12, 2009 notice, the petitioner submits evidence that [redacted] is indeed a member of AACRAO. We note that we did not contest this membership.

In response to the director's request for additional evidence, the petitioner submitted an evaluation from [redacted], President of Alien Prevailing Wage Determination, Inc. Mr. [redacted] concludes that while the beneficiary's undergraduate degree lacked the necessary credits to be considered equivalent to a U.S. baccalaureate, this degree combined with the beneficiary's NIIT diploma is equivalent to a U.S. Bachelor of Science in Computer Science with a minor in Chemistry.

As stated in our January 12, 2009 notice, USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

Our January 12, 2009 notice further advised the petitioner of the following conflicting information. Specifically, we advised that we had reviewed the Electronic Database for Global Education (EDGE) created by AACRAO (of which [redacted] is a member and whose publication he lists as a reference). AACRAO, according to its website, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." AACRAO, http://www.aacrao.org/about/ (last accessed December 18, 2008) (copy incorporated into the record

of proceeding). Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." *Id.* According to the login page, EDGE is "a web-based resource for the evaluation of foreign educational credentials" that is continually updated and revised by staff and members of AACRAO. [redacted] Director of International Education Services, "AACRAO EDGE Login," http://aacraoedge.aacrao.org/index.php (last accessed December 18, 2008) (copy incorporated into the record of proceeding).

Authors for EDGE are not merely expressing their personal opinions. Rather, authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at www.aacrao.org/publications/guide_to_creating_international_publications.pdf. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.

EDGE provides a great deal of information about the educational system in India. It discusses both Post Secondary Diplomas, for which the entrance requirement is completion of secondary education, and Post Graduate Diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate. EDGE provides that a Post Secondary Diploma is comparable to one year of university study in the United States but does *not* suggest that, if combined with a three-year degree, may be deemed a foreign equivalent degree to a U.S. baccalaureate. EDGE further asserts that a Postgraduate Diploma following a three-year bachelor's degree "represents attainment of a level of education comparable to a bachelor's degree in the United States." The "Advice to Author Notes," however, provides:

> Postgraduate Diplomas should be issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE). Some students complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor's degree.

Our January 12, 2009 notice advised that the record contains no evidence that NIIT requires a baccalaureate for admission or that it is AICTE accredited and that AICTE's list of accredited technical programs for the state of Maharashtra, which includes Mumbai, does not NIIT. *See* www.nba-aicte.ernet.in/nmna.htm (accessed December 18, 2008 and incorporated into the record of proceedings).

As stated in our notice, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In response, counsel asserts that NIIT is accredited by another organization through an affiliation with an accredited university. Counsel further asserts that our inquiry as to whether NIIT requires a three-year baccalaureate for admission to its advanced diploma program lacks "logic." The petitioner submits new evaluations from [redacted] and Professor Solomon Appel of the City University of New York (CUNY). Mr. [redacted] notes that colleges "place NIIT on their campuses to conduct all or part of their IT *training*." (Emphasis added.) Mr. [redacted] then asserts that NIIT is accredited by India's National Assessment and Accreditation Council (NAAC). Mr [redacted] concludes that he has evaluated the NIIT program's content, hours and level of education and that the academic credits from NIIT combined with the beneficiary's three-year baccalaureate "equates fully" to a U.S. baccalaureate.

[redacted] asserts that the beneficiary entered a "bachelor's level academic program" at NIIT "at the level of a fourth-year university student." Professor [redacted] references a website that purportedly confirms that NIIT requires a baccalaureate for admission. Professor [redacted] concedes that the website is no longer accessible and we were unable to access it or any related site confirming the admission requirements for an NIIT advanced diploma. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California,* 14 I&N Dec. at 190). The petitioner did not submit evidence from an official NIIT publication or NIIT official confirming that it required a three-year baccalaureate for admission to its advanced diploma program. Professor [redacted] also reiterates the assertion that AICTE is not the only entity that can accredit a school and notes that NIIT has entered into an affiliate agreement with Kuvempu University and other Indian institutions. Finally Professor [redacted] concludes that the beneficiary's education in the aggregate is equivalent to a U.S. baccalaureate.

First, the petitioner did not submit any evidence that NIIT is accredited by NAAC. Rather, it has recently formed an affiliation with a NAAC accredited institution, Kuvempu University. The petitioner submitted Internet materials regarding this affiliation. Under the agreement, NIIT students who have successfully completed a one-year diploma course at NIIT would gain admission with advanced standing to Kuvempu University's baccalaureate program. GNIIT pass-outs from NIIT with graduation from a recognized university would get lateral entry to the third semester of MSc IT programs at Kuvempu University. Nothing in these materials suggests that any credential from NIIT is the equivalent of a U.S. baccalaureate. We note that EDGE, another source we consider in evaluating a foreign education system, indicates that an Indian Master's degree following a three-year baccalaureate degree is equivalent to a U.S. baccalaureate. Thus, education sufficient to gain admission into an Indian Master's degree program does not imply that the education itself is equivalent to a U.S. baccalaureate.

NIIT also recently formed an affiliation with U.S. based ITT Educational Services. The materials provide:

> This academic alliance opened doors for NIIT students who had completed the DNIIT programme and at least one year of their bachelor's degree, to secure admission to the

> third year of the 4-year degree programme in information systems security, BS ISS. In real terms, DNIIT students would have at the end of four years three qualifications, two of which would be accredited degrees. A bachelor's degree from an Indian university, DNIIT award from NIIT, the bachelor's degree in IT from ITT Technology Institute.

This information does not suggest that the NIIT degree without the degree from ITT Technology Institute would be equivalent to a U.S. baccalaureate. Rather, the DNIIT appears to be the only unaccredited degree among the three degrees awarded through this affiliation.

The petitioner also submitted information about NAAC indicating that it is an accreditor and the autonomous body funded by the Indian Grants Commission. While the petitioner submitted evidence that Kuvempu University is NAAC accredited, the record lacks evidence that NIIT is accredited by NAAC. The materials about NIIT merely confirm that it has formed an agreement with Kuvempu University, which is NAAC accredited. The beneficiary in this matter did not receive a degree from Kuvempu University or through this affiliation.

As stated above, it has been asserted both that it is irrelevant whether NIIT required a three-year baccalaureate for admission to the advanced diploma program and that NIIT did have such an admission requirement when the beneficiary obtained his advanced diploma. Neither assertion is persuasive.

First, two lesser degrees, neither of which builds upon the other, cannot be deemed equivalent to a U.S. baccalaureate. For example, two associate's degrees, both requiring two years of post-secondary education, would not be considered equivalent to a U.S. baccalaureate. The final year of baccalaureate education requires completion of the first three years. A degree that does not require completion of the first three years of baccalaureate-level education cannot be considered equivalent to a U.S. baccalaureate. We reiterate that the EDGE materials explicitly provide: "When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor's degree." Thus, we are satisfied that our inquiry was indeed logical.

Second, we acknowledge assertion that, at the time the beneficiary was admitted to the NIIT advanced diploma program, a three-year baccalaureate was required for admission. As stated above, however, this assertion is unsupported in the record. The website referenced by [redacted] is no longer accessible and the petitioner has not provided official materials or correspondence from NIIT confirming this assertion. As we stated above, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California,* 14 I&N Dec. at 190).

In light of the above, the petitioner has not provided objective evidence to overcome the inconsistencies between the evaluations provided and the EDGE materials cited. While we would have considered peer-reviewed published materials supporting the evaluations provided, such

evidence was not submitted. Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act as he does not have the minimum level of education required for the equivalent of an advanced degree.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the

prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

On the ETA Form 9089, Part H, the petitioner indicated that a Bachelor's degree in "Science" or Engineering plus five years of experience are required for the job. The petitioner did not indicate that an alternate combination of experience and education would be acceptable. The petitioner did indicate that a foreign educational equivalent is acceptable. Thus, regardless of whether the beneficiary qualifies as a member of the professions holding an advanced degree, the petitioner must demonstrate that he has a Bachelor's degree in "Science" or Engineering or a foreign educational equivalent. For the reasons discussed above, the petitioner has not established that the beneficiary has a foreign equivalent degree to a U.S. baccalaureate.

The beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does not qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary does not meet the job requirements on the labor certification. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.